REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.23 OF 2017

(An appeal from original conviction and sentence of

Keroka SPM'S Case No. 633 of 2013 by Hon. J.

MWANIKI (SPM)- Senior Resident Magistrate

dated 17th July, 2017)

GEORGE MERABA MACHOGU & 2 OTHERS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellants herein **GEORGE MERABA MACHOGU, BEN ONGERI MORANGA** and **FRED MACHOKO MACHOGU** were jointly charged with the offence of robbery with violence contrary to S**ection 292 (2) of the Penal Code**. It was alleged that on the night of 16th/17th June 2013 at [particulars withheld], in Masaba South District within Kisii County jointly and while armed with dangerous weapons, to wit, a panga and walking sticks robbed **M K** of her radio make National Panasonic valued at Kshs. 5000/= and cash Kshs. 7,000/=.

2. The appellants also faced a second count of gang rape contrary to **Section 10 of the Sexual Offences Act No. 3 of 2006**. The particulars being that on the same night of 16th/17th June 2013, they jointly and intentionally caused their penises to penetrate the vagina of **M K**. They also faced an alternative charge to count 2 being the offence of indecent assault a female contrary to **Section 1 (1) of the Sexual offences Act**. The particulars were that on the same night they indecently assaulted **M K** by touching her private parts namely buttocks and vagina.

3. The appellants denied both counts and a trial ensued in which the prosecution presented the evidence of 4 witnesses. At the close of the prosecution's case, the trial court found that the appellants had a case to answer and placed them on their defence. At the close of the trial, the trial magistrate found all the appellants guilty of the 1st count of robbery with violence but found that the 2nd count of gang rape and its alternative charge of indecent assault was not proved to the required standards.

4. The appellants were consequently convicted of the 1st count of robbery with violence and sentenced to serve 15 years imprisonment. The appellants were however acquitted on the 2nd cunt of gang cape.

5. The appellants were dissatisfied with both the conviction and sentence and hence filed their respective appeals which were later consolidated into one appeal for the purposes of the hearing and determination. They listed the following common grounds of appeal in their petition of appeal.

> **1. The learned trial magistrate erred in fact and in law in finding and/or holding that the Appellant was guilty of the offences charged when the prosecution had not established guilt beyond the required standard of proof.**
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> **2. The learned trial magistrate erred in law and fact in analyzing and/or evaluating the Respondent's evidence separately, forming a considered opinion/impression thereof and then laying the burden of disproving and/or dispelling the pre-meditated impression upon the Appellant contrary to the established principle in criminal law, which casts the burden of proof upon the Respondent.**
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> **3. The learned trial magistrate erred in law and fact in finding and/or holding that the Appellant never attempted to exonerate themselves while the opposite is true and without assigning any credible and/or plausible reason and/or basis for such finding, consequently, the Learned Trial Magistrate failed to approach the judgment of the Appellant with an impartial judicial mind and hence the failure to take cognizance of the material discrepancies apparent in the evidence tendered by the Respondent's witnesses.**
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> **4. The learned trial magistrate erred in law and fact in failing to consider and/or disregarding the Appellant's submissions and thus arrived at a conclusion contrary to law and weight of evidence on record.**
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> **5. The learned trial magistrate erred in law and fact in making a finding that the prosecution had established guilt against the Appellant to the required standard of beyond any reasonable doubt when the Respondent's evidence was riddled with massive contradictions that could not sustain a conviction.**
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> **6. The sentence of the learned trial magistrate is excessive.**

6. When the appeal came up for hearing, Mr. Ochoki learned counsel for the appellants submitted that the appellants' conviction was unsafe since the entire prosecution case rested on the identification of the appellants yet the conditions of identification were not favorable and that even though the appellants allegedly attended an identification parade, the results or forms used in the identification parade were not produced. Mr. Ochoki further argued that the trial court relied on the inconsistent evidence of PW1 which evidence was not corroborated and that the complainant did not provide any documentary proof of ownership of the radio that was allegedly stolen.

7. It was the appellants' case that the testimony of PW2 was not relevant to the case at hand as it referred to activities that took place on a different date from the date of the alleged offence. The appellants took issue with the court's decision to proceed with the case to its conclusion despite the prosecution's application to withdraw the case upon realizing that it had no sufficient evidence to support it and despite the fact that the defence did not object to the said application for withdrawal.

8. Miss Mbelete, learned counsel for the state conceded to the appeal on the basis that the conviction was unsafe because the testimony of PW1 was not corroborated by the testimony of any other witness. PW2 who allegedly lived with PW1 at the time of the incident gave evidence that was not relevant to the case. She added that the police did not visit the scene to establish if indeed a robbery had taken place and further observed that the evidence of PW1 on the identification of the appellants was contradictory because while at the trial she testified that she was able to positively identify the robbers/appellants because they were bodaboda riders and butchers in her area, she did not state that she recognized the appellants in the initial statement that she recorded with the police and this is what caused the police to conduct an identification parade even though the identification parade documents were not produced in court.

9. Miss Mbelete also took issue with the trial court's decision to proceed with the case to the end despite the application by the prosecution to withdraw it under Section 87A of the Criminal Procedure Code upon realizing that they lacked sufficient evidence to support their case.

10. According to Miss Mbelete, the credibility of PW1 was wanting as she did not explain why she reported the sexual assault 5 days after reporting the robbery even though the two offences were allegedly committed on the same date and at the same time.

11. As the first appellate, my duty is to re-analyze and re-evaluate the entire evidence tendered by the prosecution afresh with a view to arriving at my own conclusion but while bearing in mind the fact that I neither heard nor saw the witnesses testify. (**See Okeno vs. Republic (1973) E.A 353).**

12. As I have already stated in this judgment, the prosecution presented the evidence of 4 witnesses at the trial. Their evidence was as follows:

13. PW1 M K was the complainant. Her testimony was that she was at her home on the night of 16th June 2013 when at about 11 p.m., four (4) people broke into her house switched on the electricity (lights), slapped her and demanded that she gives them money or else they would kill her. She gave them Kshs. 7000/= after which they raped her in turns before ransacking her house and making away with her Panasonic and Samsung Radio. She later found a big stone that had been used to break her door in the sitting room. She made a report to the police and gave them the description of her assailants. She added that the robbers were well known to her as they came from her area and explained that the 1st and 3rd appellants were local butchery operators while the 2nd appellant was a bodaboda rider.

14. **PW2, E M,** was the complainant's housemaid. Her testimony was that she knew the 2nd appellant as a bodaboda rider while the 1st and 3rd accused operated butcheries. She recalled seeing the 2nd appellant pass near the complainant's gate on 11th June 2013 at about 10 a.m. On cross-examination, she maintained that she was not present during the attack but that she went to the police station on 17th June 2013 where she identified the 2nd appellant because he had long hair.

15. **PW3 APC ERICK NDIWA** received the complainant's report regarding the robbery in her house. He stated that he arrested the 3 appellants upon receiving information from members of the public but that no recoveries were made following a search conducted in the appellants' houses.

16. **PW4 CPL JULIUS KERIGA** was the investigating officer. He testified that following the arrest of some suspects from [particulars withheld]area, the OCS one Chief Inspector Erastus Ravinya conducted an identification parade in which the complainant was able to identify the 3 appellants who were subsequently charged in court.

17. On cross examination, PW4 stated that PW1 did not mention the offence of rape in her initial statement of June 2013 but that she only reported the issue of rape in a further statement which she recorded on 22nd June 2013. PW4 conceded that the investigations conducted by the police fell short of the standards required in a robbery with violence case.

18. When placed on their defence, the appellants gave sworn testimonies as follows: The 1st and 2nd appellants testified as DW1 and DW2 respectively. They denied any involvement in the alleged robbery and rape.

19. DW3, the 3rd appellant similarly denied any involvement in the offence and maintained that he first saw the complainant at the police station.

Analysis and determination

20. I have carefully considered the record of appeal, the parties' respective submissions on the appeal and

I have noted that the appeal was against the conviction and sentence on the first count of robbery with violence contrary to **Section 296 (2) of the Penal Code**.

21. The main issue for determination is whether the offence of robbery with violence was proved to the required standards. My finding on this issue is to the negative for the following reasons:

22. Firstly, I am not satisfied that the appellants were properly identified as the people who actually robbed the complainant on the night in question or at all. According to the complainant, the offence took place on 16th June 2013 at night (11 p.m.) and that she was able to recognize the attackers as the local butchers and bodaboda rider because there was sufficient lighting from the electricity which the robbers allegedly switched on. At the same time, the complainant stated that the robbers had torches which they flashed on her face. What is however puzzling is why the complainant had to attend an identification parade ostensibly to identify her attackers if the appellants were well known to her.

23. The distinction between recognition and identification was discussed in the case of **Peter Musau Mwanzia v Republic [2008] eKLR**, wherein the Court of Appeal expressed itself as follows:

> ***"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition."***

24. Secondly, it was not clear who identified the appellants to the police at the time of their arrest since the complainant, who was the only eye witness to the crime was not present at the time of the arrest as she stated that she was only called to identify the suspects at the police station a day after the robbery. Without proper identification at the time of the arrest, any reasonable person may be tempted to conclude that the police were on a wild goose chase to arrest 'suspects' at random only to later on implicate them in any offence that had been reported. The arresting officer did not explain how he arrived at the conclusion that the appellants were the correct suspects in the robbery case before arresting them and purporting to subject them to an identification parade whose outcome was not formally tendered before the trial court. This court is of the view that with the promulgation of the new constitution 2010 with its expanded Bill Of Rights under Chapter 4 and especially the rights of an arrested person, days when the police could conduct random raids or swoops on 'suspected criminals' without any just cause are long gone as this was a practice that led to many innocent people being charged in court on trumped-up charges that the prosecution cannot prove. It is worthy to note that in this case, the prosecution applied to withdraw their case midstream under section 87A of the Criminal Procedure Code for lack of evidence.

25. It is my finding that the trial magistrate misapprehended the purpose and import of an identification parade when she held that the appellants were positively identified by the complainant despite her finding that the identification parade forms were not produced in court, in which case the trial court had no way of determining if the identification parade was properly conducted or not. One then wonders how the trial court arrived at the conclusion that the appellants were positively identified in the absence of the relevant documents of proof.

26. In **Anjononi & Others vs. The Republic [1980] KLR 59** it was held:

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favorable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than***

identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

27. Courts have on several occasions held that they have to warn themselves of the danger of relying on the evidence of a single eyewitness in identifying a suspect at night. In the instant case, the trial court did not take any precautions on the dangers of relying on the uncorroborated evidence of a single eye witness in purporting to identify the appellants at night.

28. It was also worthy to note that the evidence of PW1 was contradicted on very critical points and which can lead on to doubt her credibility as a witness. Firstly, while it is noteworthy that the complainant did not identify the appellants by recognition thereby leading to the constitution of an identification parade wherein she allegedly picked them out. In her later statement in court, she stated that she recognized the 1st and 3rd appellants as local area butchers while the 2nd appellant was a bodaboda rider.

29. In the case of ***Paul Etole and Another vs. Republic*** **Nairobi CACRA No. 24 of 2000** it was held that recognition is more reliable than identification by a stranger, but even then, the court should remind itself that mistakes in recognition are sometimes made. Consequently the trial court should examine the circumstances in which the identification or recognition was made. The complainant alleged that the light from electricity and the torches that the robbers had enabled her to identify them. The trial court did not enquire into the nature of the said light and its intensity or brightness so as to satisfy herself that it was free from error. I also note that the trial court did not examine closely the circumstances in which the identification came to be made considering that the offence took place at night and that there were a total of 4 assailants. Under those difficult circumstances, proper and positive identification may not be easy and the alleged recognition cannot therefore be said to be free of error.

30. It would have helpful if there was evidence to show that the complainant gave the description of the appellants to the police at the time she made her initial report to them and that it was this description that assisted the police in making the arrest. The police occurrence book was not presented to court to establish the fact that in the first report the complainant named the appellants as her attackers. I am guided by the decision of the Court of Appeal in ***Simiyu & another vs. Republic*** **(2005) 1 KLR 192,** where it was held that where the complainants allege that they had recognized their assailants, but fail to mention their names to the police, the omission to mention the attackers to the police should go to demonstrate that the complainants were not sure of the attackers identity.

31. I concur with the submissions of both the counsel that the appellants' conviction was not safe in view of the fact that the prosecution did not tender sufficient evidence to support a conviction. It is upon this realization that they did not have sufficient evidence to sustain a conviction that the prosecution opted to apply to withdraw the entire case against the appellants which application was, quite surprisingly, rejected by the trial court. My view is that the trial court had no reason to continue with the trial if the prosecution felt that they did not have enough evidence to continue with it especially taking into account the fact that the application to withdraw the case was not opposed by the appellants. PW4, the investigating officer, had the following to say during cross examination.

"I cannot rule out that that the investigations fell short of the standards required".

32. The testimony of PW4 attests to the fact that the police had no faith in their own case. It is trite law that the standard of proof in criminal cases must be beyond reasonable doubt, however, in this case, all that one can see are doubts written all over the prosecution's case.

33. On careful evaluation of the evidence recorded by the trial court and having regard to my above findings and observations, this court forms the opinion that the offence charged was not proved to the required standards and that the trial court ought to have acquitted the appellants of the same. I find that this appeal is merited and I allow it with the result that the appellants' conviction is hereby quashed, sentence set aside with a further order that they shall be set at liberty forthwith unless they are otherwise lawfully detained.

Dated, signed and delivered in open court this 16th day of November, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Miss Moguche for the appellant
- Omwoyo court clerk